

**INTERNATIONAL COMMERCIAL MEDIATION:  
A SUPPLEMENT TO INTERNATIONAL ARBITRATION**

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**I. Reasons for Considering International Commercial Mediation as a Supplement to International Arbitration**

**A. International Arbitration**

**a. Costs**

International commercial arbitration has been, for many years, the preferred means of resolving cross-border business disputes; however, the international corporate community has become increasingly concerned about rising costs, delays and procedural formalities with that adjudicatory method. In general, the following steps are necessary as part of the arbitration process (with their associated costs and fees):

- Undertake a document review of the claim and related matters; and
- Obtain a legal review and opinion; and
- Disclosure obligations; and
- Once sufficient evidence has been gathered, statements may be taken; and
- Preparation of formal experts' reports; and
- Counsel's fees will be incurred in the preparation of the pleadings, giving advice, taking statements, and for appearances at hearings; and
- Incur arbitrator(s)' fees (U.S./common law and/or non-U.S./civil law arbitrators), for reviewing statements of claims, statements of defenses, experts' reports, and for interlocutory and final hearings; and
- Fees for experts appointed by the arbitrator(s); and
- Other significant costs will be incurred associated with the hearings (rental of rooms, translators' fees [for verbal communications and for documents], stenographers' fees, etc.); and
- Fees will also be payable to the administering institution at certain stages.<sup>1</sup>

Presently, international arbitration is costly. According to a 2010 chart on comparative costs between arbitration and mediation provided by the International Chamber of Commerce (ICC), the cost of an international commercial mediation ranges from about US\$5,000.00 to US\$12,000.00, and commercial mediations are usually concluded within 2 days. According to the ICC chart, the following total

average costs were noted between arbitrations and mediations of US\$25 million disputes:

Total costs – arbitration: US\$2,836,000.00

Total costs – mediation: US\$120,000.00

The total average costs of a commercial mediation, according to the 2010 ICC chart, represent less than five (5%) percent of what the total average cost of an arbitration would be at that monetary level of dispute.<sup>2</sup>

#### **a. Duration**

International arbitration is, in general, relatively slow to bring a dispute to a final hearing. The international arbitration process can take months, and at times years for the final hearing. Thereafter, there will be further delay waiting for the Arbitration Award to be published. If the dispute is complex, and there are multiple parties and contracts, the issuance of the arbitration award could take months. There may then be further delay in enforcement of the Final Award, or in dealing with appeals before commencing the process of enforcement.<sup>3</sup> According to the 2010 ICC chart, the average times for an international arbitration are as follows:

- Hearing: 1 to 3 weeks
- Preparation: 12 to 18 months
- Overall Resolution Time: 18 to 24 months<sup>4</sup>

Further, the American Arbitration Association (AAA) conducted an international survey in 2006, in which it sought feedback on international mediation by questioning 101 Fortune 1000 companies with average revenues of US\$9.09 billion. According to that survey, the two primary reasons expressed by respondents for using mediation were: saving money and saving time. Ninety-one (91%) percent of the companies surveyed noted that saving money was a reason for their use of mediation, and eighty-four (84%) percent said saving time as another reason for using mediation.<sup>5</sup> See: <http://www.adr.org/si.asp?id=4124>.

#### **c. Formal Process with Limited Appeals**

Arbitration, while private and confidential, is an adjudicatory and formal method of dispute resolution. The arbitration award is usually not subject to appeal, except on limited and narrow procedural grounds.<sup>6</sup> The final arbitration award, on the other hand, will be recognized and enforced in many countries through the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention),<sup>7</sup> which has been signed and ratified by 154 states as of January 2015.<sup>8</sup>

### **e. The Parties' Business Relationship**

Because the process of arbitration is, as noted above, adjudicatory and adversarial in nature, the arbitration tribunal therefore looks back in time to an existing dispute, and adjudicates a winner and a loser between the parties; this process in turn can make it unlikely for the parties' business relationship to survive the arbitration process.<sup>9</sup>

### **f. Like U.S.-Styled Litigation**

International arbitration has also evolved in recent years into a proceeding that is more like U.S.-styled litigation.<sup>10</sup> A factor frequently noted for this evolution is that U.S. attorneys have become more involved in international arbitrations, as the complexity of cross border disputes have increased, and the amounts in controversy have dramatically increased to hundreds of millions or even billions of dollars.<sup>11</sup> The advent of "litigation tactics" has also increased the costs and the length of the arbitration and the adversarial nature of the process.

### **g. Litigation-Styled Discovery Techniques**

As a result of the increased complexity and damage amounts involved in international commercial disputes, resolving these disputes through arbitration requires increased fact-finding, cross border legal research and opinions, and greater investigation of damages issues. This, in turn, motivates parties to use the litigation-styled techniques and to undertake broader fact discovery; also, a significant number of arbitrations are "seated" in the U.S. and arbitrators from the U.S. are generally more likely to allow broader discovery.<sup>12</sup> This trend has been exacerbated by electronic record keeping, which becomes another significant cost factor in international arbitration. Moreover, arbitration hearings in some instances give greater importance to oral testimony and cross-examination (another technique of U.S.-styled litigation), which further increases costs. These procedural developments in international arbitration have concerned many businesses based outside the U.S. as to the efficiency of this adjudicatory method.<sup>13</sup>

## **B. International Commercial Mediation**

### **a. Less Costs and Less Time**

The 2010 ICC chart noted above comparing the average costs and the average times of international commercial arbitration vs. international commercial mediation reflects the following as to the time components related to mediation:

Average Times: Mediation

Hearing: 1-2 days  
Preparation: 3-5 days

Overall Resolution Time: 2-3 months<sup>14</sup>

The same 2010 ICC chart noted the average Total Costs for an international arbitration with 3 arbitrators and a London, UK venue, to be US\$2,836,000.00, and the average Total Costs for an international mediation with one mediator, to be US \$120,000.00. Moreover, the previously noted AAA international survey of 2006 of the Fortune 1000 companies noted that in seventy-seven (77%) percent of mediated cases, the overall costs to resolve the dispute were reduced, and that in eighty (80%) percent of the cases mediated, mediation also reduced the total time to resolve disputes.<sup>15</sup>

### **b. Preserving Future Business Relationships and Reputation Between the Parties**

Mediation, as a conciliatory process, provides the parties with the opportunity to reach an agreed settlement of their dispute, resulting in a solution acceptable to both sides. This aspect of mediation may allow for, or at times enhance, future business relationships between the parties. Mediation by its nature requires each side to understand and negotiate with the opposite party.<sup>16</sup> With the assistance of the mediator, parties are sometimes able to re-establish the trust that was compromised as a result of the dispute. Mediation, unlike arbitration, is more about how the parties can make their business relationship work better in the future. An adjudication of breach by one of the parties in an arbitration is likely to have an adverse impact as to any possibility for future business transactions between the parties. That would not necessarily be the case with a mediation settlement agreement (MSA).<sup>17</sup>

### **c. Control Over the Process**

Mediation is less formal than arbitration; as such, the parties are able to work together to:

- Select the mediator;
- Select the location and language of the mediation;
- Select the mediation rules they wish to apply;
- Select which method of mediation they prefer to use (evaluative, facilitative, etc.);
- Decide whether or not to engage in negotiations during the mediation, and to what extent and for how long to do so;
- Decide whether to exchange information and/or documents and/or experts' reports during the mediation, and to what degree to do so;
- Choose to accept or reject proposals or respond to proposals as they please;

- Choose to terminate the mediation process whenever they want to; and
- Craft the terms and conditions of a mediation settlement agreement.<sup>18</sup>

#### **d. Control over the Outcome and the Remedies**

In contrast to arbitration, which can offer only a limited range of remedies to resolve a dispute, there are virtually no limits as to what kinds of remedies and conditions (as to past disputes and possible future relationships), the parties can agree to in their MSA, as long as the terms and conditions are not illegal, or against the public policy of the jurisdiction. Remedies in mediation may include, but are not limited to:

- Agreement to settle their existing dispute;
- Agreement to settle part of their dispute and arbitrate the remaining issues;
- Agreement to undertake a future business relationship;
- Maintaining or expanding the old agreement into new endeavors;
- Agreement as to covenants not to compete;
- Agree to specific performance as to some aspects of the dispute;
- Agreement as to structure settlements with terms, conditions and times for payouts;
- Agreement as to earn-outs;
- Apologies (which in some cultures are very important);
- Agreement as to details on the specifics of how the MSA would be implemented, as well as any pledge of assets related to securing the implementation.<sup>19</sup>

The freedom to decide on the terms and conditions of the outcome of a dispute is an important factor that makes cross-border commercial mediation an appropriate and attractive supplemental tool to arbitration for resolving international business disputes.<sup>20</sup>

## **II. Considerations For the Use of International Commercial Mediation**

### **a. Enforceability of Contractual Mediation Clauses**

An agreement to mediate as part of comprehensive dispute resolution clause in an international commercial contract has recently become a more popular option.<sup>21</sup> A contractual mediation clause which sets out the specific conditions and time for triggering (and for the termination of) the mediation, and the name of the international mediation service provider, the mediation rules to be used (e.g., ICDR, ICC ADR Rules, LCIA, CPR, UNCITRAL Conciliation Rules), the substantive law to be applied during mediation, the location where the mediation will take place, and the language in which the mediation will be conducted can be of significant

consideration in the enforceability of such clause by a court, and will also facilitate a more efficient and streamlined mediation.

In some countries, where the parties have a contractual agreement to mediate a dispute, courts have declined to hear the matter if mediation was not undertaken beforehand. In countries such as Germany, England, Belgium and France, the legislatures have provided that in cases where there is a clear and unambiguous mediation clause in the contract, the courts will not hear a claim if one of the parties has invoked the contractual duty to mediate.<sup>22</sup> Also, an increasing number of E.U. states are already adopting regulations in order for contractual mediation clauses to be enforceable. Obviously, the enforceability of contractual agreements to mediate contributes to the development and success of cross-border commercial mediation.<sup>23</sup>

For a greater likelihood of the enforcement of an agreement to mediate, it is suggested that the terms of the agreement to mediate should include the following provisions:

- set out with specificity the procedure the parties will follow in setting up and commencing the mediation; and
- indicate at what point in the dispute the mediation should commence; and
- should not set out the mediation as a final and exclusive alternative to a court or arbitration proceeding, but rather, that mediation is a condition precedent to the commencement of litigation or arbitration; and
- clearly commit the parties to participate in mediation; commencement of mediation cannot be at the option of one party; and
- set out the location and language of the mediation; and
- which mediation rules and/or provider would be used; and
- if the role or style of the mediator is to be in anyway different from that provided in the mediation rules selected, that should be indicated; and
- set out the substantive law to be applied during the mediation; and
- clearly specify at what point and under what circumstances the mediation efforts will be considered fulfilled and terminated, and how the litigation or arbitration is then to be commenced.<sup>24</sup>

#### **a. Selecting the Right Mediator**

Selection of an experienced neutral mediator is an important factor in preparing for a cross-border mediation and for increasing the chances of a successful mediation process involving a cross border dispute.<sup>25</sup> Knowledge by the mediator of the substantive aspects of the dispute may be important, as well as the mediator's prior experience and his/her degree of trans-cultural sophistication, and familiarity with the cultural, commercial and legal issues involved in the particular dispute. If the parties cannot mutually agree on the selection of a mediator, the parties should consider availing themselves of recommendations and methods of selection of

mediators that may be offered by the institution selected to administer the arbitration.<sup>26</sup>

#### **b. Role and Powers of the Mediator**

Another important consideration for parties and counsel in preparation for cross-border mediation is the method of mediation to be used by the mediator; that is, should the mediator be “facilitative” or “evaluative” in his/her approach, and how proactive should the mediator be in so far as presenting settlement proposals? The answer to these questions may depend to some degree on which mediation rules are used. For example, Rule 7 of the ICDR Mediation Rules gives the mediator the option to make oral or written recommendations for settlement. Likewise, Rule 6 of the CPR European Mediation Procedure permits the mediator to present a final settlement proposal to the parties, and the mediator may also give the parties an evaluation of the likely outcome of the case at arbitration. Article 7 (4) of the UNCITRAL Conciliation Rules allows the conciliator to make a proposal for settlement at any stage of the proceedings.<sup>27</sup> Therefore, in international mediation, the role and authority of the mediator, the mediation rules selected, and the method of mediation to be used should be set out and clarified upfront by the parties in their dispute resolution clause, or by mutual agreement during the dispute. The power and scope given to mediators pursuant to some of the international mediation rules include the power to recommend settlements, to investigate the facts and law of the dispute, and to issue a written report with the mediator’s recommendations.<sup>28</sup>

#### **c. The “Language” of the Mediation**

The “language” of the mediation is another very important factor in cross-border mediations and in the selection of the mediator and also in the terms of the agreement to mediate. The mediator should be proficient in the language selected for the mediation, and able to communicate with the parties and counsel. If this important item is not addressed by the parties in their agreement to mediate, it may then be decided by the mediation rules selected. For example, Rule 18 of the ICDR Mediation Rules provides that if “... the parties have not agreed otherwise, the language(s) of the mediation shall be that of the documents containing the mediation agreement.”<sup>29</sup> Under Article 5.5 of the LCIA Mediation Rules, the mediator decides “... the language(s) in which the mediation will be conducted.” Under Article 5.4 of the ICC ADR Rules, the agreement of the parties controls the language to be used in the mediation, but if there is no agreement, the mediator decides the language or languages to be used. And under Rule 3.4(c) of the CPR European Mediation Procedure, unless otherwise agreed by the parties, the mediator decides the language in which the mediation is to be conducted and whether any documents should be translated.<sup>30</sup>

As such, the parties and their counsel need to anticipate and prepare for potential language factors. Qualified interpreters should be used if the parties and/or counsel need assistance with accurate verbal communications. Qualified translators should

be use as to documents. A conversational knowledge of a language may not be sufficient for the legal and technical communication needs that might present at the mediation. Consideration may need to be given in some cases to consulting with experts in relation to language and/or cultural barriers.<sup>31</sup> During the course of the mediation, the mediator and/or counsel should frequently restate what they think they are hearing from the mediator and/or from the other side, and seek clarification if necessary. Also, jargon or unnecessary legal terminology should not be used. On the other hand, photographs, graphs and visual aids should be used as needed, to supplement and clarify verbal communications. The terms and conditions of any settlement agreement that may be reached need to be clearly and carefully set out in a language that all the parties and counsel will understand; the version of the settlement agreement written in the language designated as the language of the mediation should be indicated as the controlling version of the MSA.<sup>32</sup>

#### **d. Cultural Considerations**

Before attending a cross-border mediation, make sure to investigate, anticipate and prepare for cultural factors. A person's culture and legal training (i.e., common law vs. civil law), and the "legal culture" of his/her practice experience is very likely to have an impact (positive or negative) on that person's approach and attitude toward the mediation process, as well as during the mediation conference. The parties and their counsel, as part of their preparation, need to have an understanding of the communication patterns and norms (verbal and nonverbal) of the opposing party and counsel, such as the so-called "high context cultures" (information found in context, and not always verbal, and values tradition), and of "low context cultures" (communicates directly and in straightforward manner, and relies on verbal communication), and of the particular cultural index for the subject mediation related to "assertiveness" vs. "cooperativeness" of the other side. "Assertive negotiators" will try to dominate the negotiations through power tactics and are reluctant to make concessions, as opposed to "cooperative negotiators."<sup>33</sup> In the appropriate dispute (depending on the complexity and amount of the claim and the cultural issues presented), language and culture barriers may at times be minimized through the use of co-mediators, that is, using an additional mediator from the subject country or region.<sup>34</sup>

#### **e. Timing of the Mediation**

In deciding at what point in the dispute the mediation should commence, or in proposing mediation during an arbitration process, parties need to consider, as to the timing for the commencement of the mediation, the availability of documents and evidence and the cost of making that evidence available. The best time to mediate a dispute otherwise subject to arbitration would be after the appointment of the arbitrator, for reasons discussed in more detail below related to the extra-territorial enforcement of MSAs. Consideration should be given to commencing the

mediation after a statement of claim and a statement of defense have been exchanged or at another point along the arbitration process in relation to the availability of documents and other evidence, and in consideration as to the cost of making the relevant evidence available.<sup>35</sup>

Knowledge of the law applicable to the dispute (including conflict of laws), could also affect the timing of when the mediation is held. An early mediation of a dispute that is otherwise subject to arbitration may not allow for the parties to develop an in-depth analysis of the legal principles applicable under the law of the contract to the facts and legal issues of the dispute, which may in turn diminish the likelihood of a successful mediation. Another factor as to the timing for commencing the mediation will be the point at which the parties reach a good factual and legal understanding as to the basis for, and amount of the damages sought in the dispute.<sup>36</sup> However, even an “early mediation” that may not settle the entire dispute might, nevertheless, be of significant value in reducing the number of legal and/or factual issues to be arbitrated, and in reducing the corresponding time and costs for overall resolution of the dispute.

#### **f. The Law Applicable to the Arbitration and the MSA**

Knowledge of the law should also include a knowledge of the law of the jurisdiction where the mediation is held and/or where an MSA, turned into an arbitration award by consent, would be enforced. That is, would an MSA reached by the parties in a dispute otherwise subject to arbitration, but reached before an arbitrator is appointed, which is then turned into a consent arbitration award by the mediator appointed as arbitrator, be recognized and enforced under the law of the jurisdiction where the mediation was held and/or under the law of the jurisdiction where the agreed arbitration award would be enforced. In international arbitration, arbitral awards may be set aside by the courts of the jurisdiction where the arbitration was held; enforcement may be refused wherever the award was made if the arbitration was not in conformity with the agreement of the parties, or if it was not in accord with the law of the country where the arbitration was held. Enforcement may also be refused if recognition or enforcement of the award would be contrary to the public policy of the country where the arbitration took place.<sup>37</sup> See further on this at Section VI(m), at top of page 19 below herein.

#### **g. Mediating the Entire Dispute or Only Components Thereof**

Not every component or issue of a cross-border dispute may be suitable for mediation. In international commercial disputes, where usually a great deal is at stake monetarily and in other ways, and/or where the legal issues to the dispute are complex (e.g., choice of law, application of mandatory law, cross-border regulatory issues, jurisdictional matters, extraterritorial application of evidentiary privileges, etc.), mediation of the entire dispute may be more difficult, and

consideration should then be given to mediating selective components or issues of the dispute and arbitrating fundamental issues of law that may be involved, or the more complex and/or adversarial factual components of the dispute.<sup>38</sup>

Contractual transactions have become much more complex in international business transactions. In an international deal, there could be: (1) a single contract with bilateral relationships; or (2) a single contract with multiparty relationships; or (3) multi contracts with multiparty relationships; or (4) multi contracts with bilateral relationships.<sup>39</sup> In an international transaction, several contracts or agreements may need to be reached for that transaction, for example: a contract of sale; a licensing agreement, a contract of carriage; a contract of insurance; an agreement of payment; and an agreement for dispute resolution.<sup>40</sup> The mediation decision might become whether to address the entire dispute at mediation, or to consider mediating only selected components of the dispute and arbitrating the others. However, the best approach when facing an upcoming final hearing in an arbitration, at substantial costs, expense and risk, which will result in a final award with limited grounds for appeal, would be to mediate and make the best effort to resolve the entire dispute, if possible, and take control over the terms and conditions of the resulting MSA and of the consent arbitral award resulting from the MSA.

### **III. Potential Drawbacks as to International Mediation**

#### **a. Voluntariness**

While there are legislation and/or court decisions in various countries that address the enforceability of mediation clauses in contracts, the extent of the effectiveness of an agreement to mediate as a dispute resolution tool is, however, limited in its efficiency by the parties' willingness to negotiate in good faith. While mediation gives the parties control over the negotiation process, this control also allows either party to terminate the mediation at any time<sup>41</sup>. Nevertheless, though the risk of one party walking away from mediation always exists (domestically or cross-border), participating in mediation may encourage the parties to make a good faith effort to attempt resolving all or some of the components of a dispute, and at a minimum, likely minimize the number of issues to be resolved at arbitration.<sup>42</sup>

#### **b. Confidentiality**

Confidentiality is of critical importance to parties in a mediation. In a cross-border mediation, the scope and extent of confidentiality protection can and does vary from country to country, and also among the various international mediation rule providers. This consideration, obviously, takes greater importance if the mediation effort does not succeed, because the information shared during mediation is then known to the other party, even if that information is not admissible in a court or in a tribunal.<sup>43</sup> Moreover, the mediator will become aware of confidential information from each of the parties during private caucuses. This is a risk factor in international

commercial mediation that must be considered, especially in Med-Arb proceedings, where the mediator may also be the arbitrator (discussed below). However, with the increasing regulation of international mediation, most controlling laws and international mediation rules do provide that any information arising from mediation is confidential and inadmissible in court or in a tribunal.<sup>44</sup> This, nevertheless, is another area that must be carefully investigated and considered by counsel; i.e.: what is the applicable law on confidentiality of mediation communications that applies to the particular dispute in the jurisdiction wherein the mediation is held; and, what do the international mediation rules chosen by the parties provide about the confidentiality of mediation communication.

#### **IV. Enforceability of Cross-Border Mediation Settlement Agreements, and Efforts to Enhance Enforceability**

In cross-border disputes, additional attention needs to be given to how a mediation settlement agreement (MSA) will be enforced outside the jurisdiction wherein the mediation takes place. Pursuing enforcement of a cross-border mediation settlement agreement on a breach of contract basis in the local court of a foreign country can take significant time, be expensive, and can be a much less reliable enforcement tool.<sup>45</sup> There are various legislative efforts from several jurisdictions to enhance the enforceability of international commercial mediation agreement, discussed at Section VI, below.

##### **a. The New York Convention of 1958**

One of the potential “solutions” to the enforcement of an MSA resulting from a cross-border mediation is for the settlement agreement to be drafted in detail and signed by the parties, and for the parties to then appoint the mediator as an arbitrator to turn the settlement agreement into an agreed arbitral award with the intent of enforcing the agreed award under the provisions of the New York Convention. However, questions persist as to whether such an agreed or consent award would be enforceable under the New York Convention.<sup>46</sup> The key legal question on this is: can an agreed award be enforced under the New York Convention if the arbitrator is appointed after the dispute is resolved by agreement in mediation.

It is accepted practice for an arbitrator to enter an “agreed award” if the parties reached the settlement agreement during the course of the arbitration. In that case, the agreed award will be the product of the parties’ settlement agreement, and not the result of the arbitrator’s decision. Such an agreed award would be enforceable under the New York Convention.<sup>47</sup> The UNCITRAL Model Law on International Commercial Arbitration adopted by the U.N. Commission on International Trade Law of 1985 permits for such an agreed award and its recognition.<sup>48</sup>

The language of the New York Convention does not appear to prohibit the recognition of an award rendered by an arbitrator appointed after the resolution of the dispute at mediation. Nevertheless, it is the general consensus that the

applicability of the New York Convention in this context is questionable as to MSAs reached by the parties in a dispute before an arbitrator was appointed, or as to MSAs turned into an arbitration award by consent, where there was no pre-existing arbitration agreement between the parties.<sup>49</sup> While the legal questions between an agreed award reached during an arbitration, and an agreed award entered by an arbitrator appointed after the parties reached a MSA has not yet been resolved, such legal differences should not be contrary to the public policy of any country so as to prohibit the enforcement of an award based on an MSA under the New York Convention.<sup>50</sup>

#### **b. Increased Momentum for an UNCITRAL Convention on Enforcement of MSAs**

Mediations of cross-border disputes have been increasing significantly as a result of the several factors discussed above; these include the perception of the “Americanization” of international arbitration, which have caused some to call arbitration the “new litigation.”<sup>51</sup> Mediation, thus, is now viewed as a useful and successful additional tool to deal with the increased costs, litigation tactics, procedural burdens and delays of international arbitration. Settlement rates in international mediation have been reported to range from between 70% to 85%.<sup>52</sup> The interest in mediation of international commercial disputes has grown significantly in the past years. Seventy (75%) percent of users responding to a January 2013 survey conducted by the International Mediation Institute indicated that arbitration providers should encourage parties to try to settle their dispute through mediation<sup>53</sup> These developments appear to imply that international commercial mediation has gained favor in both the “common law” jurisdictions as well as in the “civil law” jurisdictions.

In October 2014, a Convention on Shaping the Future of International Dispute Resolution was held in the City of London. Over 150 delegates from over 20 countries from North America, Europe, Asia, Australasia, the Middle East and Africa were asked to vote, using electronic handsets, on how international mediation and arbitration should develop in the future.<sup>54</sup> The participants consisted of users, advisors, providers, mediators, arbitrators and educators in the field of international arbitration and international mediation. About half of the 30 panelists at the Convention, and almost 20% of all delegates were corporate users, many from large multinationals.<sup>55</sup>

The following results were reported as to users (though responses were also received from the other groups of participants), which directly relate to the topic of this discussion:

- Two thirds (2/3) of users noted risk reduction and costs reduction as the most important factors in international dispute resolution;
- Over three quarters (3/4) of users voted that mediation should be used as early as possible in a dispute;

- Two thirds (2/3) of users (and providers) valued dispute resolution clauses that require mediation to take place before litigation or arbitration;
- Almost eighty (80%) percent of users thought arbitration institutions and tribunals should explore, at the first meeting, what other dispute resolution methods might be appropriate to involve in a dispute; and
- Eighty-five (85%) percent of users, and forty-seven (47 %) percent of advisors felt there is a need for an UNCITRAL convention on the recognition and enforcement of MSAs.<sup>56</sup>

Such an UNCITRAL Convention on International Commercial Mediation and Conciliation has already been proposed. The Proposal was made by the U.S. Government on June 2, 2014. (Future Work for Working Group II, U.N. Doc. A/CN.9/822).

#### **V. Other Solutions for Enhancing Enforceability of MSAs: Arb-Med-Arb and Med-Arb**

As noted above, while mediation offers important benefits over adversarial systems of dispute resolution, mediation remains underutilized in international settings in part because of the uncertain enforcement practices of MSAs in various jurisdictions. Some nations, however, have promoted legislation for the summary enforcement of mediation settlement agreements obtained by the parties in the context of a cross-border mediation or an arbitration. These nations differ as to the degree of the “arbitral context” required in their legislation to record a settlement agreement as an arbitration award.<sup>57</sup> Those will be discussed below herein.

##### **a. Arb-Med-Arb**

The Arb-Med-Arb approach begins as an arbitration, but at some point in the process, the parties try to settle the dispute through the use of mediation. Of note, a suggestion was recently made that arbitral institutions should consider incorporating into their arbitration rules a short “window” of time to permit the parties to seek a resolution of their dispute outside the arbitration process by requiring a temporary suspension of the arbitration so that a settlement may be attempted through mediation.<sup>58</sup> Moreover, the rules of the English arbitration provider, Center for Effective Dispute Resolution (CEDR) already provide for a “mediation window” whereby parties can interrupt an arbitration to try to resolve their dispute through mediation.<sup>59</sup> Under the Arb-Med-Arb method, if the parties are not able to reach an agreement (in whole or in part) during the mediation effort, the arbitration process will then be continued so that the arbitrator can hear and determine the matter and enter an award based on adjudication. Any issues that may have been resolved at mediation would be incorporated by consent into the arbitration award. If the parties do reach an agreement of the entire dispute at

mediation, their agreement will then be entered by the arbitrator, by consent, as an arbitration award enforceable under the New York Convention.<sup>60</sup>

In Arb-Med-Arb, the trend appears to be (though not always) toward using the same third party as the arbitrator and the mediator, so as to save on costs, time and for expediency. If the mediation effort is successful, then the “arbitration” is resumed for the sole purpose of the arbitrator entering an agreed award enforceable under the New York Convention.<sup>61</sup> Here again, the timing of the mediation in the Arb-Med-Arb process is very important (not only in order to have sufficient information and documents available to make for a productive mediation effort), but also because in order to obtain the benefit of enforcement of the agreed award under the New York Convention, and other similar arbitral laws and systems, the parties must first have entered into an agreement to arbitrate a present or future dispute, and appoint an arbitrator. In other words, for greater likelihood of the enforcement of an arbitral award under the Arb-Med-Arb process, the mediation settlement agreement should be reached as a result of a process which commenced as an arbitration of an existing dispute, and not a process which began as a mediation, and was later turned into an arbitration process after an MSA was reached for the sole purpose of entering an agreed award. The parties should have convened the arbitral tribunal before commencing the mediation.<sup>62</sup>

#### **b. Med-Arb**

Med-Arb is becoming a more popular process, since it is a method wherein the arbitrator can act as an arbitrator and/or a mediator during the same procedure. The advantages of this approach are that the parties can either settle the entire matter at mediation, or in the alternative, come to an agreement at mediation on certain components of the dispute. As to those components, the arbitrator can function as a mediator, resolve those specific issues by agreement, and incorporate the mediated settlement agreement into the arbitral award rendered by the “arbitrator” at the conclusion of the process.<sup>63</sup> In Med-Arb, the arbitrator is able hear both sides of a dispute during an adversarial hearing with presentations of legal evidence, and when the arbitrator feel he/she has obtained sufficient information, the arbitrator can then assume the role of a mediator to assist the parties to obtain a settlement on part of, or the entire dispute.<sup>64</sup> As to the components of the dispute not settled during the mediation phase, the arbitrator will hear and decide those as part of the arbitration phase of the process and incorporate his decision on those issues as well into the arbitral award.

As previously noted, however, if the parties in the Med-Arb process commence mediation first and settle their dispute before convening an arbitral tribunal, it could be argued that at that point there is no longer a dispute upon which an arbitrator could base an arbitral agreement. Again, therefore, to be in the best position to take advantage of the New York Convention and of the arbitration laws of many jurisdictions, in Med-Arb the settlement agreement should be reached as a result of a process that started as an arbitration, and evolved into a mediation.<sup>65</sup>

Moreover, under the local laws/rules of a number of jurisdictions, the appointment of the arbitrator cannot be made after the dispute is settled because there must be a “dispute” at the time the arbitrator is appointed.<sup>66</sup>

### **c. Detailed, Express, Written Consent Required**

In either the Arb-Med-Arb or the Med-Arb approach, if the parties are going to use the same third party as the mediator and the arbitrator in the dispute, it is of crucial importance that the parties give, at the outset their expressed, detailed, comprehensive and explicit consent in writing to the same person acting as both arbitrator and mediator, and to that same party holding separate confidential sessions with the parties in mediation, and if the mediation reaches an impasse, for the same third party to then arbitrate as the dispute.<sup>67</sup>

Because not all jurisdictions may give legal effect to such a waiver on the basis of public policy (this being another legal issue to be researched), consideration, and perhaps preference, should therefore be given to the use of separate third persons as arbitrator and as mediator (“co-med-arb”), if the monetary amount of the dispute would justify the additional costs and time required for this method. Under this co-med-arb approach, the mediator and the arbitrator hear the parties’ presentation together and both participate in non-confidential sessions. However, only the mediator can attend separate confidential sessions. That would avoid any possible objections that could be raised to a subsequent arbitration award in the event the mediation efforts fail, on the basis of lack of consent, or a breach of confidentiality, or the use of confidential information learned at caucus, or on any other basis related to the use of the same person as the arbitrator and the mediator, even in light of an express and detailed written consent signed by the parties at the outset of the process.<sup>68</sup>

### **c. Timing of the Mediation in Arb-Med-Arb or in Med-Arb**

Under either the Arb-Med-Arb or the Med-Arb methods, the timing of the mediation is important for reasons aside from enforceability of an award. As noted above, if mediation is held too late in the process, substantial costs may have already been incurred and the parties’ positions may likely have become hardened. On the other hand, if the mediation is held too early in the process, for example, immediately after the appointment of the arbitrator, the parties would not benefit during the mediation from the information that would have been gained by preparing for the arbitration.<sup>69</sup> Nevertheless, as also noted above, even an early mediation which may not be successful in resolving the entire dispute, may nevertheless resolve some of the issues of the dispute, give the parties control over the terms and conditions of how those issues are resolved, and clarify or reduce the gap as to the remaining issues to be arbitrated. This, in turn, will reduce the time and costs and fees to be invested in in the arbitration of the remaining issues.

## **VI. Entry of an Arbitral Award Based on MSAs – Various Legislation and Rules Facilitating that Goal**

Some jurisdictions and providers, in the U.S. and internationally, have enacted legislation and mediation rules to allow for the entry of an arbitration award, or a court judgment, court order or decision (at times even in the absence of a pending lawsuit or arbitration), to record and enforce a settlement agreement reached in a cross border mediation, or as part of a med-arb proceeding. A discussion on those follows:

### **a. California**

The California Code of Civil Procedure, Title 9.3, Arbitration and Conciliation of International Commercial Disputes, Section 1297.401, provides in relevant part:

“If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing, and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.”<sup>70</sup>

### **b. Colorado**

The Colorado International Dispute Resolution Act, Colorado R.S.A., Section 13-22-308, encourages parties to international transactions to resolve their disputes through arbitration, mediation, or conciliation. The statute provides that a written settlement agreement reduced to writing and signed by the parties may be submitted to the court as a stipulation and, if approved by the court, shall be enforceable as an order of the court. This provision applies even in the absence of a pending lawsuit related to the subject dispute.<sup>71</sup>

### **c. Australia**

In 2010, the jurisdiction of New South Wales (NSW), Australia, enacted Section 27D of the Commercial Arbitration Act 2010 (Act No. 61 of 2010), which as to Med-Arb proceedings, requires not only that the parties consent at the outset (in the arbitration agreement or otherwise), to the arbitrator also mediating, but that the parties expressly consent in writing (after the mediation fails and is terminated), to the arbitrator proceeding to arbitrate the dispute.<sup>72</sup> If the mediation reaches an MSA, then the mediator/arbitrator enters an agreed arbitration agreement based on the MAS. The 2010 NSW Act further provides that if the mediation fails, the arbitrator, prior to taking any action in the arbitral proceedings, shall disclose to the parties all confidential information he/she learned during the mediation phase which the arbitrator considers material to the arbitration proceeding. Under this NSW Act, the parties will have the opportunity to opt out from using the same

person as arbitrator after the mediation phase; in that case, Section 27D(6) of the NSW Act requires another person to be appointed as arbitrator.<sup>73</sup>

#### **d. Brazil**

Brazil's legislation requires the arbitrator to undertake mediation or conciliation efforts during the arbitration proceeding. Articles 21 (4) and Article 28 of the Brazilian Arbitration Law provide that the arbitrator "shall" at the beginning of the arbitration try to conciliate the parties and, if a settlement is reached, at the parties' request, the arbitrator may make then an arbitral award based on the parties' agreement.<sup>74</sup>

#### **e. China**

Article 51 of the Arbitration Law of the People's Republic of China gives authority to the arbitrator to function as a conciliator and, if a settlement agreement is reached, the arbitrator shall then prepare a conciliation agreement signed by the parties, which will have the same legal force as an award, or in the alternative prepare an arbitration award based on the settlement.<sup>75</sup>

#### **f. E.U. Directive**

In 2008, the European Parliament and the Council enacted its Directive on Certain Aspects of Mediation in Civil and Commercial matters. This Directive states in Article 6 that member states must pass legislation for state courts to enforce mediation settlement agreements, by having those agreements become court orders, judgments or decisions which can then be enforceable in all other E.U. member states pursuant to already existing European Union law, or pursuant to the domestic law of the member state.<sup>76</sup>

#### **g. Hong Kong**

Section 2B of the Hong Kong Arbitration Ordinance states that an arbitrator may act as a mediator and may meet separately with the parties, and if no settlement is reached, the arbitrator shall then disclose to the parties whatever information he/she learned during the mediation process which he/she thinks is material to the arbitration phase. The Ordinance also provides that no objection to the conduct of the arbitration shall be considered solely on the ground that the arbitrator previously served as the mediator.<sup>77</sup>

#### **h. Hungary**

In Hungary, parties to a dispute may appoint an arbitrator solely to record an award based on a mediation settlement agreement, and that an award on agreed terms has the same effect as that of any other award made by an arbitral tribunal. Hungary's Act LXXI of 1994 on Arbitration (6 VERZAL 1, Section 39, 1995).<sup>78</sup>

### **i. India**

Article 30 of India's Arbitration and Conciliation Act of 1996 states:

"It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement."<sup>79</sup>

### **j. Singapore**

The Singapore Mediation Centre and the Singapore International Arbitration Center, known as the SMC-SIAC Med-Arb Service, provides that if during the mediation the parties reach a settlement agreement, the parties can then appoint the mediator as an arbitrator for the sole purpose of recording the settlement in the form of an agreed to arbitral award. The purpose for this is to allow the MSA to be enforceable as an arbitration award under the New York Convention.<sup>80</sup>

### **k. South Korea**

The Arbitration Rules of the Korean Commercial Arbitration Board, Article 18 (3), states:

"If the conciliation success in settling the dispute, the conciliator shall be regarded as the arbitrator under the agreement of the parties; and the result of the conciliation shall be treated in the same manner as such award as to be given and rendered upon settlement by compromise under the provisions of Article 53, and shall have the same effect as an award."<sup>81</sup>

### **l. Stockholm**

The Rules of the Mediation Institute of the Stockholm Chamber of Commerce indicate, in Article 12, Confirmation of a Settlement Agreement in an Arbitral Award:

"Upon reaching a settlement agreement the parties may, subject to the approval of the Mediator, agree to appoint the Mediator as an Arbitrator and request him to confirm the settlement agreement in an arbitral award."<sup>82</sup>

### **m. A Word of Caution**

While the enactment of the laws and rules noted above are useful for increasing the likelihood of enforcement of MSAs in cross border disputes, if the appointment of an arbitrator occurs after the dispute is settled at mediation, it may not be possible in that event to achieve enforcement of an agreed arbitral award under the laws of some jurisdictions, such as, for example, the U.K. or New York, where there must be a “present or future dispute” or a “controversy thereafter arising or ... existing” to be submitted to arbitration for determination and award.<sup>83</sup> This potential obstacle to enforcement of an agreed award based on an MSA may be avoided in some cases by specifying in the mediation settlement agreement that the agreement is governed by the laws of a jurisdiction that allows the appointment of an arbitrator after a settlement agreement is reached, and that permits enforcement of an agreed award wherein the arbitrator was appointed after the mediation settlement agreement was obtained.<sup>84</sup> Also, as to MSAs reached in cross border disputes, it would be prudent and a good practice, in so far as decreasing potential obstacles to enforceability, to negotiate and specify in the settlement agreement the sources and mechanisms for implementation of the agreement, and if possible, to have specific assets pledged to satisfy the implementation of the agreement.<sup>85</sup>

### **VII. Conclusion: Legislative Suggestion to the Florida Bar’s ILS**

In light of the significant growth in the use and popularity of cross border mediation as a tool supplementing international commercial arbitration, and in order to enhance Florida’s position as an attractive forum for international commercial arbitrations, it may be a timely idea for the Legislative Committee of the International Law Section of the Florida Bar to consider pursuing a legislative initiative along the lines of some of the rules, laws or ordinances cited above herein, in order to further promote international commercial arbitrations and mediations in Florida, by enhancing the recognition and enforceability of consent awards based on mediation settlement agreements reached by the parties before an arbitrator was appointed in a dispute that would otherwise be subject to arbitration.

### **Endnotes**

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<sup>1</sup> S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 42 Washington University Journal of Law & Policy (2014), at 2 (<http://ssrn.com/abstract=2363149>). See also: John M. Barkett, *Avoiding the Costs of International Commercial Arbitration: Is Mediation the Solution?*, Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010), at 360-361, and 395; Steven Seidenberg, *International Arbitration Loses Its Grip*, ABA Connection (2010), at 2.

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<sup>2</sup> Thomas Gaultier, *Cross-Border Mediation: A New Solution for International Commercial Dispute Settlements?* NYSBA International Law Practicum, Spring 2013, at 45-46; Barkett, note 1 supra, at 359-360.

<sup>3</sup> Rhys Clift, *Introduction to Alternative Dispute Resolution: A Comparison between Arbitration and Mediation*, Hill Dickinson (2005-2006), at 7. (available at: [hilldickinson.com](http://hilldickinson.com)).

<sup>4</sup> Gaultier, note 2 supra, at 46. See also: Timothy Martin, *International Mediation: An Evolving Market*, in Arthur W. Ravine, ed., *Contemporary Issues in International Arbitration and Mediation*, The Fordham Papers (2010), at 404.

<sup>5</sup> Gaultier, note 2 supra, at 46. See also: Jacqueline Nolan-Haley, *Mediation: the 'New' Arbitration*, 17 Harv. Negot. L.R. (2012), at 10.

<sup>6</sup> Gaultier, note 2 supra, at 44; Clift, note 1 supra, at 4; Brette L. Steele, *Enforcing International Commercial Mediation Agreements as Arbitral Awards Under the New York Convention*, 54 UCLA L. Rev. (2007), at 1393.

<sup>7</sup> Steele, note 6 supra, at 1393; Gaultier, note 2 supra, at 48. See also: Thomas Stipanowich, J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 Harvard Negotiation Law Review 1 (2013), at 17.

<sup>8</sup> [http://en.wikipedia.org/wiki/Convention\\_on\\_the\\_Recognition\\_and\\_Enforcement\\_of\\_Foreign\\_Arbitral\\_Awards](http://en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards); Gaultier, note 2 supra, at 48; Seidenberg, note 1, supra, at 2; Barkett, note 1, supra, at 359; 361.

<sup>9</sup> Strong, note 1 supra, at 7; Gaultier, note 2 supra, at 46; Nolan-Haley, note 5 supra, at 13. See also: Kimberly Taylor, Mathew Rushton, *The International Challenge*, Inside Counsel.com (2012).

<sup>10</sup> S.I. Strong, *Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, a New Approach to Cures*, 7 World Arbitration and Mediation Review 117 (2013), at 118-121; Nolan-Haley, note 5 supra, at 12; Stipanowich, Lamare, note 7, supra, at 18.

<sup>11</sup> Seidenberg, note 1 supra, at 2-3.

<sup>12</sup> Id., S.I. Strong, note 10 supra, at 117; Seidenberg, note 1 supra, at 3.

<sup>13</sup> Seidenberg, note 1 supra, at 3.

<sup>14</sup> Gaultier, note 2 supra, at 46.

<sup>15</sup> Id.; Stipanowich, Lamare, note 7 supra, at 5-6.

<sup>16</sup> Gaultier, note 2 supra, at 46; Paul E. Mason, *What's Brewing in the International Commercial Mediation Process: Differences from Domestic Mediation and Other Things Parties, Counsel and Mediators Should Know*, Dispute Resolution Journal, February/April 2011, at 67.

<sup>17</sup> Gaultier, note 2 supra, at 46; Clift, note 1 supra, at 14; Edna Sussman, *The Final Step: Issues in Enforcing the Mediation Settlement Agreement*, (<http://www.sussmanadr.com>), Enforcement\_Fordham\_82008.pdf (2010), at 1; Bobette Wolski, *Arb-Med-Arb (and MSAs): A Whole which is Less Than, Not Greater Than the Sum of Its Parts*, 6 (2) Contemp. Asia Arb. J. 249 (2013), at 255.

<sup>18</sup> Gaultier, note 2 supra, at 47.

<sup>19</sup> Id.; Sussman, note 17 supra, at 3; Mason, note 16 supra, at 70; Steele, note 6 supra, at 1391. On the issue of "control over remedies", there are recent articles

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discussing whether (or not) arbitrators “split awards”, rather than ruling firmly on one party’s favor. See: Russ Bleemer, Editor, *Still Splitting the Baby: New Rand Report on Why Corporate Attorneys Use ADR*, CPR’s Alternatives (2011), at: <http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/694>; and Ana Carolina Weber, Carmine A. Pascuzzo S., Guilherme de Siqueira Pastore, Ricardo Dalmaso Marques, *Challenging the “Splitting the Baby” Myth in International Arbitration*, *Journal of International Arbitration*, Vol. 31, Issue 6 (2014), at 719.

<sup>20</sup> Gaultier, note 2 supra, at 47.

<sup>21</sup> Taylor, Rushton, note 9 supra.

<sup>22</sup> Id.; Gaultier, note 2 supra, at 47; Wolski, note 17 supra, at 256. See also: Zeno Daniel Sustac, *Overview on the Mediation in Cross-Border Conflicts – Sources and Application Areas*, Mediate.com (March 2014), <http://www.mediate.com/articles/sustac27.cfm>, at 2.

<sup>23</sup> Gaultier, note 2 supra, at 47.

<sup>24</sup> Wolski, note 17 supra, at 256.

<sup>25</sup> Barkett, note 1 supra, at 386; Harold I. Abramson, *Mining Mediation Rules for Representation Opportunities and Obstacles*, *The American Review of International Arbitration*, 15:1 (2004), at 103-104; Zeno Daniel Sustac, Jamie Walker, *Best Practice Guide on the Use of Mediation in Cross-Border Disputes*, Mediate.com (February 2014), <http://www.mediate.com/articles/sustacz6.cfm>, at 1; Gaultier, note 2 supra, at 50.

<sup>26</sup> Barkett, note 1 supra, at 387-388.

<sup>27</sup> Barkett, note 1 supra, at 388.

<sup>28</sup> Id., Gaultier, note 2 supra, at 39-40; See also: Colin J. Wall, *The Growth of International Mediation in Commercial Disputes*, *Who’s Who Legal* (September 2011) (<http://whoswholegal.com/news/features/articles/29214>), at 1-2.

<sup>29</sup> Abramson, note 25 supra, at 103; Barkett, note 1 supra at 365.

<sup>30</sup> Barkett, note 1 supra, at 388, note 137; Mason, note 16 supra, at 70.

<sup>31</sup> Eric Watness, *Cross-Cultural Mediation*, *JAMS ADR Blog*, February 13, 2013 (<http://jamsadrblog.com/2013/02/13/cross-cultural-mediation/>), at 2-3.

<sup>32</sup> Id.

<sup>33</sup> Gaultier, note 2 supra, at 51-52 (low context: U.S., Canada, Australia, Northern and Western Europe; high context: Asian countries, and most other countries not listed herein. Id. at 51); Mason, note 16 supra, at 68; Wall, note 28 supra, at 2.

<sup>34</sup> Taylor, Rushton, note 9 supra; Mason, note 16 supra, at 70.

<sup>35</sup> Barkett, note 1 supra, at 389-391, 395.

<sup>36</sup> Id., at 390, 395-398.

<sup>37</sup> Barkett, note 1 supra, at 392-394; Wall, note 28 supra, at 3; Edna Sussman, *The New York Convention Through a Mediation Prism*, *Dispute Resolution Magazine*, Vol. 15, No. 4 (Summer 2009), at 11; Alan L. Limbury, *Med-Arb: getting the best of both worlds*, *International Mediation Institute* (February 29, 2012) [[imimediation.org](http://imimediation.org)], at 2.

<sup>38</sup> Strong, note 1 supra, at 8; Gaultier, note 2 supra, at 55.

<sup>39</sup> Strong, note 10 supra, at 118-119.

<sup>40</sup> Id., at 120.

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- <sup>41</sup> Gaultier, note 2 supra, at 49.
- <sup>42</sup> Id.
- <sup>43</sup> Abramson, note 25 supra, at 108; Clift, note 1 supra, at 8; Gaultier, note 2 supra, at 44; Wall, note 28 supra, at 3; Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, NYSBA New York Dispute Resolution Lawyer, Vol. 2, No. 1 (Spring 2009), 71, at 71-72.
- <sup>44</sup> Sussman, note 43 supra, at 72.
- <sup>45</sup> Gaultier, note 2 supra, at 47; Sussman, note 37 supra, at 10; Sussman, note 17 supra, at 7.
- <sup>46</sup> Sussman, note 37 supra, at 12; Sussman, note 17 supra, at 19; Gaultier, note 2 supra, at 48.
- <sup>47</sup> Sussman, note 37 supra, at 12.
- <sup>48</sup> Id.
- <sup>49</sup> Id.; Steele, note 6 supra, at 1399-1400.
- <sup>50</sup> Sussman, note 37 supra, at 12; Steele, note 6 supra, at 1394-1401.
- <sup>51</sup> Seidenberg, note 1 supra, at 1; Strong, note 10 supra at 127; Nolan-Haley, note 5 supra, at 12.
- <sup>52</sup> Sussman, note 17 supra, at 1; Wall, note 28 supra, at 3; Gaultier, note 2 supra, at 48; *5<sup>th</sup> ICC International Commercial Mediation Conference: A Global Platform for In-House Counsel* (2014), found at: [www.iccwbo.org](http://www.iccwbo.org), at 1.
- <sup>53</sup> Edna Sussman, *Med-Arb: an Argument for Favoring Ex Parte Communications in the Mediation Phase*, World Arbitration and Mediation Review, Vol. 7, No. 2 (2013), at 1.
- <sup>54</sup> Michael Leathes, Deborah Masucci, *The Urgent Need for Data: Are the Needs of Users and the Dispute Resolution Market Misaligned?* Mediate.com (November 2014), at 1-3.
- <sup>55</sup> Id.
- <sup>56</sup> Id. See also: S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, (November 17, 2014), found at: <http://ssrn.com/abstract=2526302>. [The Proposal was made by the U.S. Government: Future Work for Working Group II, U.N. Doc. A/CN.9/822 (June 2, 2014)]. Id.
- <sup>57</sup> Steele, note 6 supra, at 1389.
- <sup>58</sup> Lucy Greenwood, *A Window of Opportunity? Building a Short Period of Time into Arbitral Rules in Order for Parties to Explore Settlement*, Arbitration International, Vol. 27 (2011), at 199.
- <sup>59</sup> Nolan-Haley, note 5 supra, at 19.
- <sup>60</sup> Wolski, note 17 supra, at 260.
- <sup>61</sup> Id.; Steele, note 6 supra, at 1397.
- <sup>62</sup> Wolski, note 17 supra, at 261; Steele, note 6 supra, at 1397.
- <sup>63</sup> Gaultier, note 2 supra, at 55.
- <sup>64</sup> Id.; Limbury, note 37 supra, at 1-2.
- <sup>65</sup> Wolski, note 17 supra, at 261.
- <sup>66</sup> Sussman, note 17 supra, at 18.

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- <sup>67</sup> Sussman, note 53 supra, at 9-10 (see specifically p. 10 for the author’s detailed suggestions as to provisions for an express written consent); Wolski, note 17 supra, at 262-263; Limbury, note 37 supra, at 3.
- <sup>68</sup> Wolski, note 17 supra, at 269; Limbury, note 37 supra, at 3.
- <sup>69</sup> Wolski, note 17 supra, at 267.
- <sup>70</sup> Sussman, note 17 supra, at 18.
- <sup>71</sup> Id., at 17. See also: Ximena Bustamante Vasconez, *The Mediated Settlement Agreement – The Ecuadorian Experience*, Journal of International Arbitration, Vol. 28, Issue 3 (2011), pp. 283-290, wherein the author notes that under Ecuadorian Arbitration and Mediation Law, an MSA (*Acta de Mediacion*), is given the same effect as a final judgment and of *res judicata*, and also establishes a summary enforcement procedure. This legal treatment of MSAs under Ecuadorian law appears to be somewhat similar to that of Colorado’s International Dispute Resolution Act.
- <sup>72</sup> Wolski, note 17 supra, at 262.
- <sup>73</sup> Id., at 262-263; Limbury, note 37 supra, at 3-4.
- <sup>74</sup> Sussman, note 17 supra, at 20.
- <sup>75</sup> Id., at 20-21; Steele, note 6 supra, at 1389; Gaultier, note 2 supra, at 55.
- <sup>76</sup> Gaultier, note 2 supra, at 47.
- <sup>77</sup> Sussman, note 17 supra, at 21; Steele, note 6 supra, at 1389.
- <sup>78</sup> Steele, note 6 supra, at 1389, footnote 16.
- <sup>79</sup> Sussman, note 37 supra, at 12.
- <sup>80</sup> Gaultier, note 2 supra, at 48.
- <sup>81</sup> Sussman, note 17 supra, at 17; Steele, note 6 supra, at 1389, footnote 17.
- <sup>82</sup> Sussman, note 17 supra, at 17-18.
- <sup>83</sup> Sussman, note 37 supra, at 11.
- <sup>84</sup> Id.
- <sup>85</sup> Steele, note 6 supra, at 1391.